NO. 49597-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

TERRY A. VANDERSTOEP and CELESTE VANDERSTOEP, husband and wife,

Plaintiffs and Respondents,

v.

GARY GUTHRIE and KATHLEEN GUTHRIE as Guardians of HOWIE I. GUTHRIE, a minor,

Defendants and Appellants.

APPEAL FROM THE SUPERIOR COURT

HONORABLE DAVID GREGERSON

BRIEF OF RESPONDENTS

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RESPONSE TO ASSIGNMENT OF ERROR

The trial court did not err by denying the Defendants' Motion to Set Aside the Default Order and Motion to Vacate the Default Judgment.

ISSUES PRESENTED

1. Did the trial court abuse its discretion by denying the motion to vacate?

2. Can the prima facie defense required to set aside a default judgment be based solely on the amount of noneconomic damages when the amount awarded is supported by substantial evidence?

3. Can there be a finding of mistake, inadvertence, surprise, or excusable neglect when the failure to respond to the summons and complaint was caused by a breakdown of internal processes of the liability insurer obligated to afford a defense to its insureds?

STATEMENT OF THE CASE

I. The Incident and Injuries.

During the afternoon of July 10, 2014, Howie Guthrie was traveling eastbound on N.E. 244th St. At the same time, Terry VanderStoep was heading westbound on the same road. Young Mr. Guthrie made a left turn at the intersection of N.E. 244th St. and SR 503. He did not yield right

of way to Mr. VanderStoep and drove his parents' Chevrolet Suburban into Mr. VanderStoep's small Chevrolet pickup. (CP 15-17)

Mr. VanderStoep suffered serious injuries in this collision. These included severe lacerations to his left hand which required twenty-four stitches; a left shoulder strain; multiple abrasions; a contusion of the right knee with swelling. An MRI of his knee was done that showed a high grade full thickness chondral defect. Bone marrow edema was also visible on the MRI. (RP 3-30-16 6-7; CP 12)[1] He developed gluteal pain as well as pain in his low back, right leg, and right hip. The imaging studies that were done showed a large disk herniation at L3/4 that caused a severe narrowing of his spinal canal and a near complete spinal block. This condition required a decompressive laminectomy and discectomy with Coflex stabilization performed on February 3, 2015. The surgery was successful in relieving most leg symptoms. It did not resolve his right hip pain, however. (RP 3-30-16 7: CP 13) Mr. VanderStoep incurred a total of $61,836.44 in medical expenses. (CP 13) At the time of the crash, he was a groundskeeper at a local golf course. He suffered wage loss of $12,000.00 because of his injuries. (CP 13-14) As can be expected, Mr.

[1] There is a verbatim report of proceedings for a hearing on March 30, 2016, and another for a hearing on July 29, 2016. Each will be referred to by date.

VanderStoep required his wife's assistance in common activities during his recovery from surgery. (CP 14; RP 3-30-16 9)

Mr. VanderStoep decided to try to return to work since he had a good result from his back surgery. His employer agreed to hire him at an increased wage because of his value to the golf course. (RP 3-30-16 8) When Mr. VanderStoep returned, however he found that he could no longer do the physical work required of a groundskeeper such as getting down on his knees to work. These problems caused him to retire effective November 1, 2015. (CP 13; RP 3-30-16 8)

II. Events Prior to Suit.

The Guthries had a policy of motor vehicle liability insurance with American Family Mutual Insurance Company (American Family) that was in effect on July 14, 2014. Their policy likely contained provisions obliging American Family to "defend any suit or settle any claim for damages payable under this policy as we think proper." (CP 134, 137)

The VanderStoeps hired William Robison to represent them in connection with the collision. He was assisted by Tammy Hutchinson, a paralegal with the firm. As is customary, Ms. Hutchinson sent Mr. VanderStoep's treatment records to American Family and spoke to their adjusters. At no time did any of them suggest that young Mr. Guthrie was not totally at fault in connection with the collision. (CP 132) On May 1,

2015, she spoke with the adjuster handling the case. He conceded that Mr. VanderStoep's surgery was causally related to the collision and made a settlement offer. (CP 132)

On January 18, 2016, Mr. Robison stated that the VanderStoeps would settle the case for $225,000.00. (CP 53) American Family's Stacy Thrush responded by mail and offered $145,060.44. (CP 53) Mr. Robison and Ms. Thrush spoke on February 16, 2016. At that time, Ms. Thrush stated that her offer was not negotiable. Mr. Robison told her that he would file suit and that she should alert the Guthries that they would soon be served with process. Ms. Thrush did not request a copy of the complaint or notification of its filing. She simply ended the call. (CP 11)

Ms. Thrush took Mr. Robison's suggestion seriously. At an undetermined time in February, she contacted the Guthries and told them to expect to be served and to promptly report when that occurred. (CP 56)

III. From Suit to Judgment.

This action was filed on February 18, 2016. (CP 1) The Guthries were served on February 27, 2016. (CP 5-10) On that same day, Kathleen Guthrie called American Family to report the service of process. She spoke with a representative—not Ms. Thrush—for approximately thirteen minutes and answered all questions the representative had. (CP 56) When there was no response from Ms. Thrush, Ms. Guthrie called again

sometime between February 29, 2016, and March 1, 2016, and left a message for Ms. Thrush. (CP 56) Still hearing nothing, Ms. Guthrie called again on March 7, 2016, and left another message for Ms. Thrush. (CP 57)

American Family uses a computerized system to record all events and communication in connection with a claim. (CP 131-32) There is a record in that system of Ms. Guthrie making calls. (RP 7-29-16 23) Nonetheless, and without giving an explanation as to what occurred, Ms. Thrush has stated that she did not receive Ms. Guthrie's messages. (CP 53)

By March 24, 2016, no appearance had been filed on behalf of the Guthries. The VanderStoeps then moved for default and for a default judgment. (CP 20-28) The trial court signed an Order of Default on March 29, 2016, which was filed the next day. (CP 30-31) On the same day, it held a hearing concerning the amount of the default judgment. Information was presented in the form of testimony from the VanderStoeps and a declaration from counsel outlining the collision, injures, course of care, and economic damages.[2] (CP 11-19; RP 3-30-16

[2] The trial court has considerable discretion in determining the extent of proof needed to establish the amount of a default judgment and can rely on declarations. *Trinity Universal Underwriters of Kansas v. Ohio Casualty Insurance Co., infra.* 176 Wn.App. at 206. No objection was made to the trial court about its considering the declaration.

6-9) The trial court then entered Findings of Fact and Conclusions of Law.[3] Based on these, it granted judgment to the VanderStoep's in the principal amount of $373,836.44. This included medical expenses of $61,836.44; wage loss of $12,000.00; and $300,000.00 for non-economic damages inclusive of Mrs. VanderStoep's claim for loss of consortium. Finally, the trial court awarded costs of $743.92. The total of the judgment was $374,580.36. (CP 32-35)

IV. Subsequent Events.

On April 21, 2016, Ms. Thrush called Mr. Robison. She left a voice message asking if suit had been filed. Mr. Robison returned the call. He got a voice message telling him that Ms. Thrush was out of the office and that the voice mailbox was not accepting messages. (CP 139)

Ms. Thrush called Mr. Robison again on June 7, 2016. She asked him if he had filed suit. He told her that when he receives a non-negotiable offer and says that he is going to file suit, he files suit. Ms. Thrush replied to the effect that she had never had a claim with Mr. Robison before and that many attorneys later call back to take the offer. Mr. Robison advised her that suit had been filed, served, and that a judgment had been taken. He e-mailed her the documents at her request. (CP 139-40) Ms. Thrush then called Ms. Guthrie who confirmed that she

[3] The findings of fact are set out in the appendix.

had been served with process and that she had called American Family in February to report that she had been served. (CP 57)

V. The Motion to Vacate.

Counsel appeared for the Guthries on June 8, 2016. (CP 38) On July 6, 2016, the defense filed the Defendants' Motion to Set Aside the Default Order and Motion to Vacate the Default Judgment. Its content will be discussed below. On July 29, 2016, the trial court heard argument on the motion and orally denied it. (RP 7-29-16 28) The Order Denying Defendants' Motion to Set Aside the Default Order and Motion to Vacate the Default Judgment was entered on August 15, 2016. (CP 142-45) The defense subsequently appealed.

ARGUMENT

I. Standard of Review.

A motion to vacate or set aside a default judgment is equitable in nature. The decision on such a motion is addressed to the sound judicial discretion of the trial court. Its decision will not be reversed unless that discretion has been abused. *White v.Holm,* 73 Wn.2d 348, 351, 438 P.2d 581 (1968); *Little v. King,* 160 Wn.2d 696, 702-703, 161 P.3d 345 (2007)

A trial court abuses its discretion when it takes a view no reasonable person would take. *Cox v. Spangler,* 141 Wn.2d 431, 439, 5 P.3d 1265 (2000) Discretion is also abused when the decision is

manifestly unreasonable, based on untenable grounds, or made for untenable reasons. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standards. It is based on untenable grounds if the factual findings are unsupported by the record. It is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.,* 140 Wn.App. 191, 199, 165 P.3d 1271 (2007)

At the end of the day, the discretionary judgment of a trial court of whether to vacate a judgment is a decision upon which reasonable minds can sometimes differ. For this reason, if the discretionary judgment of the trial court is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld. *Lindgren v. Lindgren,* 58 Wn.App. 588, 595, 794 P.2d 526 (1990)

As will be shown below, the trial court's decision was reasonable, and it did not abuse its discretion in denying the defense's motion.

II. Standard for Determination of Motion to Vacate.

The defense moved to vacate on the basis of CR 60(b)(1). (CP 94-95; Opening Brief of Appellants, p. 14) That rule allows vacation of judgments based on "mistakes, inadvertence, surprise (or) excusable neglect." The party seeking vacation must also set out "the facts

constituting a defense to the action or proceeding." CR 60(e)(1) The Court set out the following formulation for the consideration of motions to vacate default judgments in *White v. Holm, supra,* 73 Wn.2d at 352-3:

> A party moving to vacate a default judgment must be prepared to show (1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated. This is not a mechanical test; whether or not a default judgment should be set aside is a matter of equity. Factors (1) and (2) are primary; factors (3) and (4) are secondary.

See also, *Little v. King, supra,* 160 Wn.2d at 703-704 (1997)

The presence of a valid defense is the most important of these factors. If the rule were otherwise, vacating a default judgment would be pointless because a subsequent trial would simply result in another judgment in favor of the plaintiff. *Griggs v. Averbeck Realty,* 92 Wn.2d 576, 583, 599 P.2d 1289 (1979); *North Western Mortgage Investors Corporation, v. Slumkowski,* 3 Wn.App. 971, 973, 478 P.2d 748 (1970); Tegland, *Civil Procedure,* 14 Wash.Prac. § 9.26, cited in *Rosander v. Night Runners Transport, Ltd.,* 147 Wn.App. 392, 196 P.3d 711 (2008) That consideration led the Court in *White v. Holm, supra,* 73 Wn.2d at 352-53, to discuss the interplay of the four factors in the following way:

> Thus, where the moving party is able to demonstrate a strong or virtually conclusive defense to the opponent's claim, scant time will be spent inquiring into the reasons which occasioned entry of the default, provided the moving party is timely with his application and the failure to properly appear in the action in the first instance was not willful. On the other hand, where the moving party is unable to show a strong or conclusive defense, but is able to properly demonstrate a defense that would, prima facie at least, carry a decisive issue to the finder of the facts in a trial on the merits, the reasons for his failure to timely appear in the action before the default will be scrutinized with greater care, as will the seasonability of his application and the element of potential hardship on the opposing party.

There are other equities that must be considered. A court "must balance the requirement that each party follow procedural rules with a party's interest in a trial on the merits." *Griggs v. Averbeck Realty, Inc., supra,* 92 Wn.2d at 581 (1979) Thus, while default judgments are disfavored because of the policy preferring resolution on the merits, the courts of our state "also value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules." *Little v. King, supra,* 160 Wn.2d at 703 Furthermore, and as the Court observed in *Morin v. Burris,* 160 Wn.2d 745, 757, 161 P.3d 956 (2007):

> But litigation is inherently formal. All parties are burdened by formal time limits and procedures. Complaints must be served and filed timely and in accordance with the rules, as must appearances, answers, subpoenas, and notices of appeal. Each has its purpose, and each purpose is served

with a certain amount of formality monitored by judicial oversight to ensure fairness.

As will be seen below, the defense has not presented even a prima facie defense. It has also not demonstrated mistake, inadvertence, surprise, or excusable neglect. When both are absent, the motion to vacate must be denied—it is an abuse of discretion to grant the motion. *Little v. King, supra,* 160 Wn.2d at 706 Therefore, the trial court did not abuse its discretion by denying the motion.

III. No Sufficient Defense Was Presented.

a. The Defense's Position.

A party seeking to recover in a tort action such as this must show the defendant's duty, the breach of that duty, proximate cause, and resulting damage or injury. *Hoffer v. State,* 110 Wn.2d 415, 421, 755 P.2d 781 (1988) In its motion, the defense conceded the first two of these elements and 100% fault in connection with the incident. The defense did not dispute that Mr. VanderStoep sustained the injuries that he claimed to have suffered in the collision or that the need for his back surgery was caused by the collision. While the motion stated that it was directed toward vacating the damages portion of the judgment (CP 90), the defense took no issue with the reasonableness and necessity of Mr. VanderStoep's treatment expenses and did not question his wage loss. The motion did

not dispute Mr. VanderStoep's entitlement to noneconomic damages or Mrs. VanderStoep's right to an award for loss of consortium. It only questioned the amount of noneconomic damages which it claimed were excessive. (CP 46; CP 94; CP 85-97)

When the motion was argued, counsel for the defense mentioned the amount of non-economic damages only. Reference was made to "our defense in the non-economic damage award;" the defense's need "to prepare a defense on the noneconomic damages at issue;" the "prima facie defense to our challenge to the excessive award of noneconomic damages;" and "the noneconomic issue that we're dealing with here in this matter." (RP 7-29-16 7, 8, 9, 12) There was no mention of the nature of Mr. VanderStoep's injuries; no argument as to whether those injuries were caused by the collision; and no question raised concerning the reasonableness or necessity of his treatment expenses or the amount of his wage loss. (RP 7-29-16 4-13, 23-26)

The defense is making the same argument now. It questions only the amount of non-economic damages for Mr. Vandrstoep and the loss of consortium award for Mrs. VanderStoep. As it states:

> In a case where there is some evidence that the injuries have resolved without complication and that the Plaintiff was returning to his "usual activities without restriction" there is a defense to a claim for $285,000 in noneconomic damages. There is similarly a defense to the $15,000 loss

> of consortium award given the evidence of a relatively short recovery period.

Corrected Opening Brief of Appellants, p 12

This is not sufficient to make out a defense under the circumstances presented in this case as will be discussed below.

b. The Test for Vacating the Damages Portion of a Default Judgment.

A defaulting defendant bears the risk of surprise at the size of the award. Nonetheless, substantial evidence must support the amount of damages awarded in a default judgment. Conversely, a party seeking to vacate a default judgment on the basis of a defense to the amount of damages must show that the damages award is not supported by substantial evidence. In this context, substantial evidence is that quantum of evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Shepard Ambulance, Inc., v. Helsell,* 95 Wn.App. 231, 240-42, 974 P.2d 1275 (1999) This formulation was adopted by the Supreme Court in *Little v. King, supra,* 160 Wn.2d at 704, as follows:

> The amount of damages in a default judgment must be supported by substantial evidence. See, e.g., *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson.* (Citations omitted) It is not a prima facie defense to damages that a defendant is surprised by the

> amount or that the damages might have been less in a contested hearing. *Shepard,* 95 Wn.App. at 242.

Therefore, the only issue is whether the trial court's finding of a total of $300,000.00 in noneconomic damages for the VanderStoeps was supported by substantial evidence. And substantial evidence exists when the plaintiff produces enough evidence to meet the burden of production and thereby avoid a motion to dismiss as a matter of law made under CR 50. Tegland *Civil Procedure* 14A Wash.Prac. § 33:17

c. The Trial Court Applied the Correct Test.

The trial court denied the motion to vacate because the amount of non-economic damages was supported by substantial evidence. It stated:

> . . .After careful review of the cited cases and the hearing of the argument, I think the most appropriate ruling is that the disputing of the noneconomic damages by itself seems to insufficient grounds for oversetting the default. I think there was substantial evidence of substantial injury and medical expenses under the circumstances. From that, the Court heard testimony albeit not fully developed or with cross-examination, but with substantial evidence and representation of counsel that the damages entered by the Court were legitimately entered and appropriately entered at that time. So the Court will deny the motion.

RP (7-29-16 28) This decision was based on the proper considerations.

The trial court first indicated that a defense that questions only the amount of noneconomic damages is not sufficient. This is

supported by the Court's clear statement in *Little v. King, supra,* that it is not a defense to damages that a party is surprised by the amount or that the amount might have been less in a contested hearing.

The trial court went on to say that its noneconomic damages award was supported by substantial evidence. This decision was also correct. The trial court's findings of fact consist of the facts of the collision in Finding of Fact No. 2; the injuries Mr. VanderStoep suffered along with his back surgery in Finding of Fact No. 3; his failure to return to his prior activity level in Findings of Fact No. 4, which is supported by his inability to sustain a return to work; Finding of Fact No. 5 which gives Mr. VanderStoep's life expectancy; Finding of Fact No. 6 which sets out his treatment expenses; Finding of Fact No. 7 which discusses his wage loss; and Finding of Fact No. 8 discussing the assistance given to Mr. VanderStoep by his wife. These matters were spelled out in declaration form and also by the VanderStoeps' testimony.

The injuries Mr. VanderStoep sustained entitled him to noneconomic damages. *Palmer v. Jensen,* 132 Wn.2d 193, 197, 937 P.2d 597 (1997)*; Fahndrick v. Williams,* 147 Wn.App. 302, 306, 194 P.2d 1005 (2008) The amounts were given in Finding of Fact No. 9. This finding of fact reads as follows:

> A reasonable value for the general damages case given the severity of the injury is $300,000.00. In addition, plaintiff's medical specials and wage loss totaling $73,836.44 should be awarded.

(CP 34) The finding shows that the trial court focused on the severity of the injury. This is an appropriate consideration. A trier of fact is entitled to consider the nature and extent of any injury in coming to a damages award. WPI 30.04. And it is undisputed that Mr. VanderStoep suffered multiple abrasions, a severe laceration, a serious injury to his knee, and a significant disk herniation that required surgery. Therefore, this finding was also supported by substantial evidence. It cannot be questioned because the amount of damages is the province of the trier of fact, in this case, the trial court. *Bingaman v. Grays Harbor Community Hospital*, 103 Wn.2d 381, 599 P.2d 1230 (1985)

In any event, at the trial court, the defense did not claim that the VanderStoeps are not entitled to noneconomic damages or that the noneconomic damage award was not supported by substantial evidence. (CP 85-97) It has also made no such argument in its brief.[4]

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[4] The defense cannot assert in its reply brief that the award was not supported by substantial evidence since it made no argument to that effect in its opening brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)

In short, and contrary to the defense's argument, the trial court applied the correct test in determining whether a sufficient prima facie defense existed.

d. No Facts Showing a Prima Facie Defense Were Presented.

As stated in both *White v. Holm, supra,* and *Little v. King, supra,* the defense must produce substantial evidence of a prima facie defense. This can be a dispute about fault as in *Berger v. Dishman Dodge, Inc.,* 50 Wn.App. 309, 748 P.2d 241 (1987), and *Akhavuz v. Moody, Akhavuz v. Moody,* 178 Wn.App. 526, 315 P.3d 572 (2013), or a dispute about causation as was attempted in *Little v. King, supra.* Presumably, this would be something not presented to the trial court at the time the default judgment was obtained. There is no prima facie defense here.

The asserted defense in this case is based on chart notes from Mr. Vandestoep's visits with his neurosurgeon after the surgery and in February and March of 2015. These notes indicate that the surgery had resolved his complaints of leg pain; that his back pain was improved; and that he was returning to daily activities. (CP 83-84) The defense also points to the absence of anything in these chart notes to the effect that Mr. VanderStoep will have any ongoing difficulties. Corrected Opening Brief of Appellants, p. 11-12 It then claims that these notes are "inconsistent"

with what was represented to the trial court at the time of the default judgment.

There is no "inconsistency" because the trial court was advised that Mr. VanderStoep had obtained a good result from the back surgery. He testified that his back was better. (RP 3-30-16 8) Counsel's declaration disclosed that "the surgery was successful in relieving most leg symptoms." (CP 13)

There is also no "inconsistency" between the chart notes and what Mr. VanderStoep experienced after the March 2015 chart note. The trial court was told about what problems Mr. VanderStoep had experienced in the year since his visit to his neurosurgeon in March of 2015. These post-surgery residuals could not possibly be "inconsistent" with the March 2015 chart note because those problems could be known only after that visit. When Mr. VanderStoep attempted to return to work as a groundskeeper at the golf course, he had difficulty doing the job because the rest of his body had taken a beating in the collision. (RP 3-30-16 8) He was waking up with a variety of aches and pains associated with the collision. He could not get down on his knees to work on the greens, a condition likely related to his knee injury in the collision. He had right hip pain. (CP 13) He clearly was a valued employee who enjoyed his work but simply found that he could not do his job any longer.

Furthermore, no claim can be made that Mr. VanderStoep was 100% recovered in March of 2015. The March 11, 2015 chart note states that he was still wearing a lumbosacral corset and still had some back pain. He was given lifting and activity restrictions. There was also discussion of a light exercise program and playing golf. (CP 84)

The defense also argues that an inconsistency exists because the March 11 chart note does not say that there will be residual problems thereafter. It also does not rule out some level of continuing problems. There is simply nothing in the chart note—one way or another—about whether there will be any residual issues. If that was going to be addressed at all, the neurosurgeon was going to address it later. The chart note ends with the statement that "(Mr. VanderStoep) will be reassessed in 2 months when we hope to perform a closing examination." (CP 84)

In short, the trial court considered the fact that Mr. VanderStoep had received significant benefit from the surgery. He testified that his back was better than it had been before the surgery. The trial court was told not only that Mr. VanderStoep tried to return to his normal activities but what happened when he actually did. Unfortunately, things did not go as well as might have been hoped. The chart notes in 2015 could not possibly be inconsistent with subsequent events.

e. The Asserted Prima Facie Defense Is Nothing More than a Dispute Over the Amount of Damages Awarded.

At the end of the day, the defense believes that the trial court's award of noneconomic damages was simply too large given the facts of this case. This is made clear in the following excerpt from Corrected Opening Brief of Appellant, p. 12, set out above and repeated here:

> In a case where there is some evidence that the injuries have resolved without complication and that the Plaintiff was returning to his "usual activities without restriction" there is a defense to a claim for $285,000 in noneconomic damages. There is similarly a defense to the $15,000 loss of consortium award given the evidence of a relatively short recovery period.

As the Court made clear in *Little v. King, supra,* it is not a prima facie defense to damages that a defendant is surprised by the amount or that the damages might have been less in a contested hearing. Therefore, there is no defense.

Furthermore, and for the defense's argument to make sense, there must be a standard for what noneconomic damages should be in a given situation that the trial court misconstrued. But as the Court noted in *Ma v. Russell,* 71 Wn.2d 657, 661, 430 P.2d 518 (1967), there is no standard for the measurement of damages for pain and suffering which are noneconomic damages. The pattern damage instruction in personal injury

matters, WPI 30.01.01, concludes with the following language to this effect:

> . . .The law has not furnished us with any fixed standard by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

Because there is no fixed standard, no argument can be made that an award by a trier of fact in one amount or another is too much or, for that matter, is not enough. The defense is asking the Court to substitute its judgment for that of the trial court in what amount should have been awarded for noneconomic damages. This is something that should not be done. *Bingaman v. Grays Harbor Community Hospital, supra.*

The defense cannot argue that without some sort of appellate review, defaulting defendants could be exposed to astronomical awards. First of all, and as noted above, a defaulting defendant bears the risk of a large award. Secondly, the trial court does not function as a rubber stamp for anything that might be claimed. As the Court said in *Lenzi v. Redlands Insurance Co.,* 140 Wn.2d 267, 281, 996 P2d 603 (2000):

> Judges and commissioners must not be mere passive bystanders, blindly accepting a default judgment presented to it. Our rules contemplate an active role for the trial court when the amount of a default judgment is uncertain.

Accord, *Little v. King, supra,* 160 Wn.2d at 706 Significantly, the trial court was not a rubber stamp in this case. It declined to award anything for Mr. VanderStoep's loss of earning capacity due to a lack of proof. (RP 3-30-16 10-12)

The same argument the defense is making here was made in *Rosander v. Night Runners Transportation, Ltd., supra.* In rejecting an argument to vacate a $500,000.00 award of noneconomic damages in a default judgment, the Court said:

> In Little (v. King), our Supreme Court held that a trial court abuses its discretion if it sets aside a default judgment solely because the "defendant is surprised by the amount or ... the damages might have been less in a contested hearing." 160 Wn.2d at 704. Rather, "[w]here a party fails to provide evidence of a prima facie defense and fails to show that its failure to appear was occasioned by mistake, inadvertence, surprise, or excusable neglect, there is no equitable basis for vacating judgment." Little, 160 Wn.2d at 706. Nightrunners' sole argument on damages is: "In light of the medical costs incurred and the injuries complained, it does not appear equitable or just for Respondent to receive a judgment for general damages in excess of $ 500,000.00!" Br. of Appellant at 29-30. This is not a prima facie defense to the damage award and falls squarely under the holding in Little, 160 Wn.2d at 705-06.

147 Wn.App. at 408

The defense here argues that because the back surgery was successful, $285,000.00 for non-economic damages and $15,000.00 for loss of consortium is too much. That is not a sufficient defense as *Little v.*

King, supra, and *Rosander v. Night Runners Transport, LLC, supra,* show. In fact, the trial court would have abused its discretion if it had vacated the default judgment on the basis of such a defense.

f. The Defense Cannot Rely on *Calhoun v. Merritt* and Other Similar Cases.

The defense places heavy reliance on *Calhoun v. Merritt,* 46 Wn.App. 616, 731 P.2d 1094 (1986), a case decided by Division Three of the Court of Appeals. That case arose out of a motor vehicle collision. The plaintiff obtained a default judgment that included noneconomic damages of $50,000.00. The defendant moved to vacate the judgment. It submitted the declaration of an insurance adjuster to the effect that the claim was worth less than $50,000, and that he believed that he had a defense to damages although he could not say what the defense was. The trial court denied the motion. On appeal, the Court noted that the adjuster's declaration was insufficient to show a prima facie defense. Nonetheless, it held that the trial court abused its discretion by denying the motion to vacate because the default judgment was entered before any discovery could take place. 46 Wn.App. at 620-21.

Thirteen years later, Division One of the Court of Appeals decided *Shepard Ambulance, Inc., v. Helsell, supra.* The opinion recognized and addressed the decision in *Calhoun v. Merritt, supra,* and

noted that it did not contain a standard for when a default judgment should be vacated on the basis of the damages award. It then announced the rule stated above—the default judgment can be vacated if it is not supported by substantial evidence. 95 Wn.App. at 241-42

The Supreme Court resolved whatever conflict existed between *Calhoun v. Merritt, supra,* and *Shepard Ambulance, Inc., v. Helsell, supra,* in *Little v. King, supra.* It clearly adopted the formulation in *Shepard Ambulance, Inc., v. Helsell, supra.* It also required the defendant to come forward with substantial evidence of a prima facie defense. 160 Wn.2d at 704 Its rejection of the approach in *Calhoun v. Merritt, supra,* is best demonstrated by a review of the dissenting opinion in that case. That opinion stated that the facts of *Little v. King, supra,* paralleled those in *Calhoun v. Merritt, supra.* It took the position that the lack of discovery in the context of a default judgment is an appropriate consideration for determining whether a default judgment should be vacated. 160 Wn.2d at 714 The dissent's endorsement of *Calhoun v. Merritt, supra,* together with its apparent rejection by the majority opinion shows that nothing more than a need to do discovery to counter damages believed to be excessive will not be a sufficient to satisfy the requirement of a prima facie defense.

The defense cites two other cases in support of its argument, *Norton v. Brown,* 99 Wn.App. 118, 992 P.2d 1019 (1999), and *Gutz v. Johnson,* 128 Wn.App. 901, 117 P.3d 390 (2005). Neither of these is helpful. In *Norton v. Brown, supra,* the trial court found that a prima facie defense existed based on the amount of damages awarded in the default judgment. There was no claim in that case, as here, that the trial court abused its discretion in making that finding, and the plaintiff in that case does not appear to have argued that there was no prima facie defense. In *Gutz v. Johnson, supra,* the Court ruled that the motion to vacate should have been granted because the defendant had informally appeared and was entitled to notice of the default hearing. Although not necessary to its decision (128 Wn.App. at 915-16), it opted to determine whether a defense was presented. It found defenses both in fault and damages. The damages defense appeared to be related to matters of causation although the amounts of noneconomic damages were also discussed. The Court noted that one of the plaintiffs first sought treatment two years after the incident and indicated that this raised questions about whether the claimed injuries were caused by the collision. As to the other plaintiff, the Court referred to prior neck and back problems that also raised questions about what

injuries she suffered in the incident.[5]

Importantly, neither of these cases mentioned the holding of *Shepard Ambulance, Inc., v. Helsell, supra,* and the rule that default judgment awards are to be evaluated on whether they are supported by substantial evidence. This is important because *Little v. King, supra,* adopted the formulation set out in *Shepard Ambulance, Inc., v. Helsell, supra.* Also, there is no question here, as there was in *Gutz v. Johnson, supra,* about what the injuries, course of care, and residuals have been. Furthermore, the defense has not claimed here that the noneconomic damage award was not supported by substantial evidence. It is also noteworthy that two of the judges involved in the decision in *Gutz v. Johnson, supra,* also concurred in the opinion in *Rosander v. Nightrunners Transport Ltd., supra.*

These considerations require the conclusion that cases decided prior to *Little v. King, supra,* are no longer controlling authority for determination of whether a prima facie defense exists as to damages. After *Little v. King, supra,* it is clear that a defendant seeking to vacate a default judgment based on damages must come forward with substantial

[5] The Court in *Little v. King, supra,* determined that a defense based on pre-existing conditions is not sufficient to raise a prima facie defense. This undercuts the value of *Gutz v. Johnson, supra,* as viable precedent on this issue.

evidence of a prima facie defense and cannot rely on the absence of discovery. The defense has not pointed to any case decided after *Little v. King, supra,* allowing a defense to damages based on any of these cases. By contrast, the Court in *Rosander v. Night Runners Transport, Ltd., supra,* decided whether a defense to damages existed based on the formulation in *Little v. King, supra,* and *Shepard Ambulance, Inc., v. Helsell, supra.*

g. *Little v. King* Cannot Be Distinguished.

The defense attempts to distinguish *Little v. King, supra.* It is on point and must be followed.

In that case, Ms. King's car rear-ended Ms. Little's on the freeway on two occasions within a short time of each other. The impacts were alleged to be a low speeds, and both vehicles were drivable. Ms. Little suffered injuries to her cervical spine that required two surgeries. Her problems ultimately caused her to stop working. She obtained a default judgment that included her treatment expenses, past and future income loss, and $650,000.00 in noneconomic damages. The motion to set aside the default judgment called attention to pre-existing conditions in an effort to refute any causal connection between the incidents and Ms. Little's need for surgery and her other related losses. The trial court set aside the default judgment. The Court reversed. As discussed above, it

stated that a default judgment must be supported by substantial evidence; that the defendant must provide prima facie evidence of a defense; and a prima facie defense will not be established by either surprise at the amount of damages or a suggestion that the amount might be less at a contested hearing. 160 Wn.2d at 704. It then said that the mere reference to pre-existing conditions did not provide evidence of a defense on the issue of causation. 160 Wn.2d at 704-705

The defense argues that *Little v. King, supra,* is distinguishable because it has supplied evidence of a defense. In fact, it has not. It has simply pointed to facts that were also presented to the trial court when it made its award of non-economic damages—that Mr. VanderStoep's condition improved considerably after his surgery—and then asserted that the amount of the noneconomic damages was too high based on those facts. This is nothing more than surprise at the amount of the non-economic damages or a suggestion that the amount might have been lower at a contested hearing. It ignores the fact that there is no fixed standard for noneconomic damages and that an award can reasonably be made at one amount or another. It also ignores the trial court's finding of fact to the effect that its noneconomic damages award was based on the severity of the injury. That is not sufficient as a defense based on *Little v.*

King, supra, as the Court made clear in *Rosander v. Night Runners Transport, LLC, supra.*

Once again, the defense must show that the damages award was not supported by substantial evidence. This could be the absence of evidence that the plaintiff had actually sustained the claimed injuries as in *Shepard Ambulance v. Helsell, supra.*[6] That is not the case here. In fact, the defense has not even argued that the noneconomic damages award is not supported by substantial evidence.

In short, *Little v. King, supra,* is on point. No prima facie defense was presented there and none has been presented here.

h. Conclusion.

In this case, the trial court's decision was supported by substantial evidence. The defense has not argued to the contrary. It has also not produced evidence supporting a prima facie defense. An allegation that the facts do not support the amount of an award of noneconomic is not a sufficient defense to justify vacation of a default judgment. A motion to vacate should be denied when there is no evidence of a defense. *Griggs v. Averbeck Realty, supra; North Western Mortgage Investors Corporation, v. Slumkowski, supra*; Tegland, *Civil Procedure,* 14

[6] In that case, the damage award was based on the plaintiff's suffering broken ribs. A defense was made out because there was no substantial evidence that the plaintiff had sustained that injury. 95 Wn.App. at 242

Wash.Prac. § 9.26 There is no point in having a trial limited to noneconomic damages when the trial court's award is supported by substantial evidence.[7] Therefore, the trial court did not abuse its discretion in denying the motion to vacate in this case.

IV. There Is No Mistake, Inadvertence, Surprise, or Excusable Neglect.

a. Introduction.

A party seeking to vacate a default judgment must show mistake, inadvertence, surprise, or excusable neglect as required by CR 60(b)(1). If that is not demonstrated, a default judgment cannot be vacated even if the moving party has a prima facie defense. *Johnson v. Cash Store,* 116 Wn.App. 833, 68 P.3d 1099 (2003); *Akhavuz v. Moody,* 178 Wn.App. 526, 315 P.3d 572 (2013)

The existence of sufficient mistake, inadvertence, surprise, or excusable neglect is determined on a case-by-case basis. *Griggs v. Averbeck Realty, supra,* 92 Wn.2d at 582; *Rosander v. Night Runners Transport, Ltd, supra,* 147 Wn.App. at 406. Contrary to the defense's argument, Corrected Opening Brief, p. 17, fn. 4, the trial court has broad

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[7] Any trial would also address Mr. Vanderstoep's loss of earning capacity since the trial court made no award for that element.

discretion over this issue and does not construe the evidence in the light most favorable to the defendant. *Rosander v. Night Runners Transport, Ltd., supra,* 147 Wn.App. at 406

The defense claims to have a prima facie defense as opposed to a conclusive defense. Therefore, and as noted in *White v. Holm, supra,* "the reasons for his failure to timely appear in the action before the default will be scrutinized with greater care." When that is done, it is clear that there is no mistake, inadvertence, surprise, or excusable neglect sufficient to show that the trial court abused its discretion in denying the motion to vacate the default judgment.

b. There Was No "Mistake."

The defense rests its argument on the assertion that there was a genuine misunderstanding between the Guthries as the insured and the insurer as to who was responsible for answering the complaint and that this is a mistake for the purposes of CR 60(b)(1). No such "mistake" existed as the facts of this case show.

Prior cases have held that an insured's mistake as to who is undertaking the defense of a case can justify vacation of a default judgment in the context of that particular case. In *White v. Holm, supra,* the insured believed that the insurer was going to defend him despite the existence of a coverage question. That is not the case here. Both the

Guthries and American Family knew that American Family was responsible for the defense of the claim.

Prior cases have also held that an insured's confusion about exactly what to do when served with process can be a sufficient "mistake." In *Calhoun v. Merritt, supra*, the insured was told to expect service of a summons and complaint but was not told what to do when he was served. He did not contact his insurer when served because he believed that the insurer was taking care of the matter. In *Norton v. Brown, supra*, the insurer did not warn Mr. Brown that a lawsuit was being commenced; that he should expect service of a summons and complaint; and that he should immediately forward the process he received to his insurer. As a result, Mr. Brown was confused about what to do with the summons and complaint and did not inform the insurer that he had been served. 99 Wn.App. at 124 The insurer learned of the suit by some means. It retained counsel who filed a notice of appearance on the same day and hours before Mr. Norton took a default judgment. Counsel for Mr. Norton did not advise of the existence of the default judgment. It came to light ten months later when Mr. Brown filed a motion to compel. 99 Wn.App. at 121

The latter two cases share a common thread. The insured didn't know what to do with the summons and complaint when he

received it. As a result, he did not let the insurer know he had been served because he believed his insurer was protecting his interests. When the insured knows exactly what to do when served and immediately notifies the insurer that service has been effectuated, there is no mistake. That was the ruling in *Akhavuz v. Moody, supra.* In that case, the insured faxed the summons and complaint to the insurer the day after being served. The Court stated that there was no mistake because both the insured and the insurer understood who was supposed to handle the defense. 178 Wn.App. at 535-36

The facts of our case are governed by *Akhavuz v. Moody, supra.* Once again, there was no mistake as to who was responsible for the defense—that was American Family. Ms. Thrush had advised the Guthries that they might be served and that they should advise American Family as soon as that happened. When served, Ms. Guthrie called American Family the same day, and on two other occasions, to advise what had occurred.

Finally, any suggestion that a party's "mistake" about what must be done after service of a summons and complaint flies in the face of the clear language of a summons. The summons in this case conformed to the language of CR 4(b)(2) and told the Guthries that they were required to respond within twenty days after service or a default judgment would be

taken. (CP 1) Any suggestion that an individual served with process makes a "mistake" sufficient to relieve him or her of a default judgment can no longer stand in light of the following statement by the Court in *Morin v. Burris, supra,* 160 Wn.2d at 757:

> Parties formally served by a summons and complaint must respond to the summons and complaint or suffer the consequences of a default judgment.

The defense has pointed to two other cases in support of its argument. Neither is authority for the position it is taking. The first of these is *Berger v. Dishman Dodge, Inc.,* 50 Wn.App. 309, 748 P.2d 241 (1987). In that case, the defendant was served and promptly forwarded the summons and complaint. The adjustment firm handling the defense sent the wrong case file to the legal firm it asked to conduct the defense. As a result, a default judgment was taken. The defense in that case sought to vacate the judgment on the basis of a mistake, the adjustment firm's sending of the wrong file to the defense firm. The Plaintiff argued that this was not a mistake of the insured—the named party—but rather a mistake of the adjuster. The Court disagreed and ruled that mistakes of the insurer are attributable to the insured and affirmed the vacation of the default judgment. The second case is *Gutz v. Johnson, supra.* In that case, the Court of Appeals reversed the denial of a motion to vacate primarily on the basis that the defendant had informally appeared due to

contact between the insurer and counsel for plaintiff prior to filing suit and was therefore entitled to notice of the default hearing. The Supreme Court took review and decided it as one of the cases presented in *Morin v. Burris, supra.* It first ruled that appearances prior to suit were insufficient to require notice prior to entry of a default judgment. It then indicated that there was evidence to suggest that the attorney for the plaintiff had concealed the filing of the suit from the insurer and that this might amount to fraud, misrepresentation, or misconduct to allow vacation under CR 60(b)(4). It remanded the matter to the trial court for further consideration. 160 Wn.2d at 758-59 For that reason, the Court of Appeals decision in *Gutz v. Johnson, supra,* has no precedential value.

The defense also claims a mistake on the part of the Guthries because they believed that American Family was protecting their interests. That argument was not and cannot be separated from the mistake the insured made in not advising the insurer that he had been served in *Calhoun v. Merritt, supra,* and *Norton v. Brown, supra.* In other words, if the insured knows exactly what to do and does it, the insured has not made a mistake at that point.

However, if the insured does not hear back from the insurer for some time and does not know what is happening in the case, the insured is guilty of inexcusable neglect and cannot obtain a vacation of a

default judgment. That is what occurred in *Akhavuz v. Moody, supra.* As indicated, the insured faxed the complaint to the insurer the day after service. The adjuster asked the plaintiff's attorney for a settlement demand but did not hire counsel to represent the insured. The attorney for the plaintiff sent settlement materials but also obtained a default judgment thirty-five days after service. Six months later, the adjuster discovered the default judgment by looking at the online trial docket and hired counsel. But no appearance was made at that time. A motion to vacate the judgment was filed shortly before the one year limit for motions based on CR 60(b)(1) as stated in CR 60(b). The Court noted that the insured's failure to inquire about the status of the case over the intervening year made it responsible for the insurer's inexcusable neglect in dealing with the matter.

The Guthries failed to follow up for three months after they reported service even though they heard nothing from Ms. Thrush or an attorney appointed to represent them. This amounted to inexcusable neglect on their party.

c. American Family Is Guilty of Inexcusable Neglect.

No timely appearance or answer was filed in this case because of a breakdown in American Family's office procedures. There is no mistake, inadvertence, surprise, or excusable neglect when that occurs.

A number of cases have held that a default judgment cannot be set aside when the failure to appear comes from a breakdown in office procedures. *Johnson v. Cash Store, supra*—denial of motion to vacate affirmed because of no excusable neglect when store manager who received summons and complaint wrote to plaintiff's counsel asserting no liability but did not forward process to central administration or corporate counsel; *TMT Bear Creek Shopping Center v. Petco Animal Supplies, Inc., supra,* 140 Wn.App. at 212-13—no excusable neglect when the defendant did not appear because process received from registered agent was not entered into the legal department's calendaring system, the person responsible took leave for vacation and an injury, and her replacements were not trained to do so or incompetent; *Rosander v. Night Runners Transport, Ltd., supra*—no excusable neglect when counsel was not hired prior to a default hearing due to an adjuster's disability leave, and the insurer's failure to receive a properly sent notice of a hearing; *Trinity Universal Underwriters of Kansas v. Ohio Casualty Insurance Co.*, 176 Wn.App. 185, 198, fn. 6, 312 P.3d 976 (2013)—failure of agent for service of process to forward the summons and complaint amounts to a breakdown of internal office procedures and therefore not excusable neglect.

The seminal case in this line was *Prest v. American Bankers Life,* 79 Wn.App. 93, 900 P.2d 595 (1995). The defendant was served through the Office of the Washington Insurance Commissioner pursuant to RCW 48.05.210. That office sent the summons and complaint to the person designated by Defendant to receive it. He was out of town and had been reassigned to other duties. The summons and complaint was therefore mislaid and not timely forwarded to the right person. In reversing the grant of a motion to vacate the default judgment, the Court stated that this was inexcusable because responding to suits is an important part of an insurance company's business. 79 Wn.App. at 100

What happened here can only be a breakdown of one of the most basic office procedures—acting upon or returning an important phone call. Ms. Thrush told Ms. Guthrie to report the service of process. Ms. Guthrie called American Family to do so on three separate occasions between February 27, 2016, and March 7, 2016. On February 27, 2016, she spent thirteen minutes on the phone with an American Family representative telling that person that she had been served; giving "all pertinent information;" and answering all questions. She left messages for Ms. Thrush on the last two calls she made. (CP 56) All the calls were within twenty days after the Guthries were served and in plenty of time for American Family to engage counsel to enter an appearance on their

behalf. American Family utilizes an internal system where all interactions on a claim are logged electronically. (CP 131-32) During argument before the trial court, defense counsel stated:

> With regard to American Family providing an internal log, American Family is not disputing at this time that they have a line in their system that Ms. Guthrie made some calls. The problem is we don't know what that line means, they're trying to find out. It just simply didn't make its way to Ms. Thrush...

(RP 7-29-16 23-24) In other words, Ms. Guthrie's calls were logged on American Family's internal communication system and no reason is given why Ms. Thrush didn't see them and didn't respond. This can only be a breakdown in internal systems.[8]

American Family can hardly deny the importance of a good communications system or the prompt returning of calls. People involved in claims work have to communicate with their insureds, attorneys, and investigators, among others, in order to resolve claims. If communication systems are compromised, the company's work cannot go forward. American Family also places a premium on its personnel returning calls to customers or insureds such as the Guthries. It has terminated agents for,

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[8] The problem had apparently not been resolved by April of 2016. Mr. Robison returned Ms. Thrush's telephone call and left a voice message but she reports not receiving it.

among other things, not returning customer phone calls. See *Clifton v. American Family Mutual Insurance Company,* 507 F.3d 1102, 1105 (8th Cir. 2007)

The defense has speculated on why Ms. Thrush might not have received Ms. Guthrie's calls. Corrected Opening Brief of Appellant, p. 17 This causes our case to compare unfavorably with the other cited cases where no excusable neglect was found based on a breakdown in office procedures. The defendants in those cases were at least able to explain what had occurred. American Family cannot. The inability to explain what happened shows the most egregious breakdown in office procedures.

The defense also tries to characterize what happened as a "mistake" or a series of mistakes. (RP 7-29-16 24) Corrected Opening Brief of Appellant, p. 17 One dropped call could be a mistake. But the failure to get three important calls to the right person is much more than a mere mistake—it is a breakdown in office procedures. And the failure to deal properly with critical notices of court proceedings due to a breakdown in office procedures is inexcusable neglect as the cases cited above make clear. This is especially true for insurance companies whose business is litigation. See, *Prest v. American Bankers Life, supra*

The most troubling aspect of this situation is American Family's failure to submit a copy or printout of its computerized internal system on this case so that the trial court could review it to see what had occurred and exactly what was contained on the "lines" to which defense counsel referred. The only conclusion that can be drawn from that failure is that the material would not help American Family. This inference is required by the following language in *Pier 67 v. King County*, 89 Wn.2d 379, 385, 573 P.2d 2 (1977):

> We have previously held on several occasions that where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him. In so holding, we have noted, "'[t]his rule is uniformly applied by the courts and is an integral part of our jurisprudence. . ."

American Family's failure to respond when Ms. Guthrie reported service of process is an egregious breakdown of internal processes. It cannot amount to excusable neglect.

d. American Family's Inexcusable Neglect Is Attributable to the Guthries.

The defense suggests that any issue of mistake, inadvertence, surprise or excusable neglect must focus on the Guthries and ignore the inexcusable neglect of American Family. Therefore, as the

argument might go, excusable neglect is present even if the failure to respond timely to a summons and complaint is clearly the result of inexcusable neglect on the part of the insurer. That has been referred to as the "innocent insured" doctrine. As the Court in *Akhavuz v. Moody, supra,* 178 Wn.App. at 534-35, stated, no such doctrine exists. The Court further stated:

> Insurance companies do not have an automatic right to vacation of a default judgment when they fail to communicate to an insured that nothing is being done. If an insurer's reasonable excuse for a short delay can be attributed to the defendant for purposes of weighing the second White factor (excusable neglect), as was done in Berger (v. Dishman Dodge, Inc.,), there is no reason why the insurer's lack of a reasonable excuse for a lengthy delay cannot also be attributed to the defendant.

178 Wn.App. at 538 This is illustrated by the Court's decision in *Leslie v. Spencer,* 170 Okla. 642, 42 P.2d 119 (1935), one of the cases cited with favor in *Berger v. Dishman Dodge, Inc., supra,* 50 Wn.App. at 312. In *Leslie v. Spencer, supra,* an adjuster was told to engage certain attorneys to defend a medical negligence claim. He simply did not do so. As a result, a default judgment was taken. The Court ruled that this was inexcusable negligence that was attributable to the insured since they had asked the insurer to defend.

An insurer's excusable neglect has been attributed to the insured in other cases. In *Smith v. Arnold,* 127 Wn.App. 98, 110 P.3d 257

(2005), the plaintiff secured an order of default on December 20, 2002, after serving the defendants on October 4, 2002. The insurer had received a copy of the complaint on November 20, 2002. The defendants had not immediately sent the summons and complaint to the insurer because the defendant wife's illness put the suit "low on their list of priorities." The insurer simply did not see to the filing of an appearance to prevent a default even though it had ample time to do so after receipt of the summons and complaint. Relying on *Prest v. American Banker's Life, supra,* the Court stated that neither the insurer nor the insured had shown excusable neglect and affirmed a denial of the motion to vacate the default order. And in *Rosander v. Night Runners Transport, Ltd., supra,* the Court found an absence of excusable neglect solely on the insurer's failure to secure counsel to appear at or before a hearing on a motion for default judgment. The actions of the insured after service of process were not discussed in the Court's opinion. An argument was made to the effect that the default judgment violated the insured defendant's due process rights. In rejecting that argument, the Court stated, among other things, that the defendant had chosen to defend through its insurer. 147 Wn.App. at 402

In *Akhavuz v. Moody, supra,* the Court attributed to the insured the insurance company's failure to hire counsel to appear citing the insured's failure to inquire about the status of the action for a substantial period of

time, and reversed the trial court's grant of a motion to vacate a default judgment. 178 Wn.App. at 538-539 In all of these cases, the Court did not relieve the insured of a judgment obtained because of the misfeasance of the insurer.

Our case is quite similar to *Akhavuz v. Moody, supra.* The Guthries found out about the default judgment over sixty days after it was entered and from Ms. Thrush. (CP 57) After their calls to American Family in March, they did nothing to follow up on the status even though they had been served with a document that told them that an answer had to be filed within twenty days of service and even though they had received nothing from American Family or any attorney to the effect that an answer was being filed. The Guthries were not required under any circumstances to rely on American Family. They were free to engage an attorney of their own choosing to appear on their behalf in the suit pending some resolution of the representation issue from American Family.[9] Their lack of any inquiry for over ninety days after service of process and calls to American Family attributes to them American Family's inexcusable neglect.

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[9] Counsel has entered appearances for clients pending appointment of counsel by an insurer.

American Family's neglect is attributable to the Guthries because of the relationship between them. American Family is contractually obligated to the Guthries to defend them in this suit. This duty is one of the main benefits of the policy. *American Best Food, Inc., v. Alea London, Ltd.,* 168 Wn.2d 398, 405, 229 P.3d 693 (2010) In exercising this duty, the liability insurer occupies a fiduciary relationship to its insured. *Tank v. State Farm Fire & Casualty Co.,* 105 Wn.2d 381, 385, 715 P.2d 1133 (1986) Obviously, an attorney also occupies a fiduciary relationship with the client. *Perez v. Pappas,* 98 Wn.2d 835, 840, 659 P.2d 475 (1983)

A party is responsible for the conduct of his or her attorney and the neglect of the attorney cannot form the basis of excusable neglect for the purposes of CR 60(b)(1). *Pybas v. Paolino,* 73 Wn.App. 393, 869 P.2d 427 (1994)—holding that attorney's failure to see to the timely filing of a trial *de novo* request did not amount to excusable neglect. In the context of vacation of default judgments, the client is responsible for monitoring the attorney's conduct. If the attorney does not perform, the client's remedy is against the attorney and not against his or her adversary. *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 608-12 (7th Cir. 1986)[10]

[10] This case was cited with favor in *Luckett v. Boeing Company*, 98 Wn.App. 307, 312-13 989 P.2d 1144 (1999) The Court also noted that decisions interpreting FRCP 60(b) are instructive because of the similarity of that rule to CR 60(b).

Both the attorney and the liability insurer are responsible to the client/insured for defense of an action. If a party cannot obtain vacation of a judgment because of the neglect of his or her attorney, there is no reason that the result should be different where the insurer's neglect caused the default.

Attributing American Family's inexcusable neglect to the Guthries means that the default judgment against the Guthries must stand. But American Family will have to pay the entire judgment. An insurer who breaches the duty to defend is liable to the insured for the amount of the judgment. And when the failure to defend arises from either negligence or bad faith, the insurer is liable for the entirety of the amount of the judgment, including the portion above the insured's liability limits. *Kirk v. Mt. Airy Insurance Company,* 134 Wn.2d 558, 561-62, 951 P.2d 1124 (1998); *Besel v. Viking Insurance Company of Wisconsin,* 146 Wn.2d 730, 735, 49 P.3d 887 (2002); *Tyler v. Grange Insurance Association,* 3 Wn.App. 167, 172-173, 473 P.2d 193 (1970) The Guthries were obviously entitled to a defense from American Family. And they were entitled to a defense that was prompt and timely. *Truck Insurance Exchange v. Vanport Homes, Inc.,* 147 Wn.2d 751, 765, 58 P.3d 276 (2002) The Guthries advised American Family that they had been served. But American Family did nothing due to breakdowns in internal office

procedures that have not been explained. The cost of the judgment will—and should—fall on American Family. This is especially warranted here when American Family had the opportunity to settle the matter prior to suit but failed to do so.

e. Conclusion.

There is no mistake, inadvertence, surprise, or excusable neglect here. There was no mistake as to who was responsible for the defense. The failure to respond stems from a breakdown of American Family's office procedures. This is attributable to the Guthries as discussed above. The absence of any mistake, inadvertence, surprise, or excusable neglect provides another reason why the trial court's denial of the motion to vacate the default judgment was not an abuse of discretion and should be affirmed.[11]

V. Other Factors.

In *White v. Holm, supra,* the Court set out two secondary factors—diligence after discovery of the default judgment and prejudice to the party obtaining the judgment. Based on existing precedent, the VanderStoeps must concede the defense's diligence after notice of the judgment and the absence of prejudice.

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[11] A decision can be affirmed on any grounds supported by the record. *Truck Insurance Exchange v. Vanport Homes, Inc., supra,* 147 Wn.2d at 766

The status of these two factors is not significant. Since the defense has not shown either a defense or mistake, inadvertence, surprise, or excusable neglect, the trial court's decision denying the motion to vacate cannot be reversed. *Little v. King, supra,* 160 Wn.2d at 706—where there is not sufficient evidence of a defense and no mistake, inadvertence, surprise, or excusable neglect, vacation of a default judgment is an abuse of discretion.

VI. The Equities Do Not Favor the Defense.

The defense claims that the equities favor it because counsel for the VanderStoeps did not notify American Family of the filing of the suit or the filing of the default motion, even though he was not required to do so. Corrected Opening Brief of Appellant, p. 22 This argument must be rejected.

First of all, the defense in this case was provided with notice of the pendency of the action through service of process. Nothing further is required. Since no one had appeared on behalf of the Guthries, and since no one from American Family had contacted counsel for the VanderStoeps after filing of the complaint, or after service of process, neither the Guthries nor American Family were entitled to notice of the default hearing. *Morin v. Burris, supra,* 160 Wn.2d at 758

Secondly, the notion that American Family had to be notified prior to obtaining a default judgment was rejected in *Caouette v. Martinez*, 71 Wn.App. 69, 78, 856 P.2d 725 (1992), where the Court stated:

> We do not believe that a plaintiff's failure to notify a nonparty insurer of her intention to obtain a default judgment against an insured is a basis for vacation of a default order and judgment. Martinez has cited no authority, and our research has revealed none, that stands for the proposition that it is inequitable to enter a default judgment against a defaulting party without first notifying that party's insurer.

See also, *Aecon Buildings, Inc. v. Vandermolen Construction Company, Inc.*, 155 Wn.App. 733, 740, 230 P.3d 594 (2009)

Parenthetically, counsel for the VanderStoeps was not required to notify American Family that the trial court had granted the default judgment. As a matter of strategy, a party obtaining a default judgment is entitled to suspend notification until the expiration of the one-year deadline for filing a motion based on CR 60(b)(1). *Trinity Universal Underwriters of Kansas v. Ohio Casualty Insurance Co., supra,* 176 Wn.App. at 196

By contrast, the Guthries and American Family were not diligent in pursuing their rights. They did not take the obvious step, for whatever reason, of appearing in the action after service of process. Equity will not help them because equity aids the vigilant and not those who slumber on

their rights. *Leschner v. Department of Labor and Industries*, 27 Wn.2d 911, 927-28, 185 P.2d 113 (1947)

In short, the defense can claim no advantage based on equity.

VII. If This Matter Is Remanded, the Trial Court Should Assess Terms.

The Court should affirm the denial of the motion to vacate. If it does not, however, it should remand with direction to the trial court to consider what terms should be imposed on the defense. CR 60(b)

CONCLUSION

The defense seeks to vacate the default judgment so that it can contest the amount of noneconomic damages found by the trial court. That award was supported by substantial evidence. The defense has not argued to the contrary. There is also no substantial evidence of a prima facie defense. There is an absence of sufficient mistake, inadvertence, surprise, or excusable neglect to justify vacation. Therefore, the trial court did not abuse its discretion in denying the defense's motion to vacate. Its decision must be affirmed.

DATED this 8 day of February, 2017.

BEN SHAFTON WSB#6280
Of Attorneys for the VanderStoep

APPENDIX

Findings of Fact Entered by the Trial Court on March 30, 2016

2. The subject collision occurred (on) July 10, 2014 in Battle Ground, Washington. The defendant minor was not yet 16 and was driving under a "learner's permit." Defendant failed to yield the right-of-way to plaintiff's vehicle and caused the collision.

3. The testimony reflects that Mr. VanderStoep had severe lacerations to his left hand, as well as left shoulder strain, multiple abrasions and a contusion of the right knee with swelling. He sustained a significant disk herniation at L3/4 resulting in a decompressive laminectomy and discectomy with Coflex stabilization performed on February 3, 2015.

4. The testimony reflects that Mr. VanderStoep has never returned to his prior level of activity, and continues to suffer right hip pain.

5. Mr. VanderStoep's anticipated life expectancy is 14.41 years.

6. Mr. VanderStoep incurred medical bills of $61,836.44. Future medical bills attributable solely to this crash are not anticipated.

7. Mr. VanderStoep is a full time groundskeeper at Lewis River Golf. He was fully off work from July 10, 2014 to August 7, 2014, and then worked part time/light through December 12, 2014. He was fully off again for surgery and recovery from January 12, 2015 to March 16, 2015. Total income loss if $12,000.

8. Mrs. VanderStoep had to assist her husband with many of his basic day to day activities during his recovery from surgery.

9. A reasonable value for the general damages case given the severity of the injury is $300,000.00. In addition, plaintiff's medical specials and wage loss totaling $73,836.44 should be awarded.

(CP 33-34)

Rules

CR 4(b)(2)

Form. Except in condemnation cases, and except as provided in rule 4.1, the summons for personal service in the state shall be substantially in the following form:

Superior Court of Washington

For [_____] County

_____,	)	
Plaintiff,	)	No. _____
v.	)	
_____,	)	*Summons* [20 days]
Defendant.	)	

To the Defendant: A lawsuit has been started against you in the above entitled court by _____, plaintiff. Plaintiff's claim is stated in the written complaint, a copy of which is served upon you with this summons.

In order to defend against this lawsuit, you must respond to the complaint by stating your defense in writing, and by serving a copy upon the person signing this summons within 20 days after the service of this summons, excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where plaintiff is entitled to what he asks for because you have not responded. If you serve a notice of appearance on the undersigned person, you are entitled to notice before a default judgment may be entered.

You may demand that the plaintiff file this lawsuit with the court. If you do so, the demand must be in writing and must be served upon the person signing this summons. Within 14 days after you serve the demand, the plaintiff must file this lawsuit with the court, or the service on you of this summons and complaint will be void.

If you wish to seek the advice of an attorney in this matter, you should do

so promptly so that your written response, if any, may be served on time. This summons is issued pursuant to rule 4 of the Superior Court Civil Rules of the State of Washington.

[signed]

_____
Print or Type Name

_____
( ) Plaintiff ( ) Plaintiff's Attorney

P.O. Address_____
Dated _____
Telephone Number_____

CR 60(b), (e)

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order. . .

(4) Fraud (whether heretofore denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party. . .

(e) Procedure on Vacation of Judgment

(1) *Motion.* Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or the applicant's attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

NO. 49597-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TERRY A. VANDERSTOEP and CELESTE VANDERSTOEP, husband and wife,

Plaintiffs and Respondents,

v.

GARY GUTHRIE and KATHLEEN GUTHRIE as Guardians of HOWIE I. GUTHRIE, a minor,

Defendants and Appellants.

APPEAL FROM THE SUPERIOR COURT

HONORABLE DAVID GREGERSON

DECLARATION OF ELECTRONIC SUBMISSION

BEN SHAFTON
Attorney for Plaintiffs and Respondents
Caron, Colven, Robison & Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660
(360) 699-3001

COMES NOW Ben Shafton and declares as follows under penalty of perjury under the laws of the State of Washington:

1. My name is Ben Shafton. I am attorney for the Plaintiffs/Respondents in this matter.

2. An agreement has been reached between the parties allowing for service by electronic means.

3. On February 8, 2016, I transmitted by e-mail the Brief of Respondents and this declaration as follows:

To Megan Ferris at mferris@msmlegal.com

To Leslie Kocher-Moar at lkochermoar@msmlegal.com

To Kristin Welsh at kwelsh@msmlegal.com.

DATED at Vancouver, Washington, this 8th day of February, 2017.

BEN SHAFTON WSB#6280
Of Attorneys for the Plaintiffs/Respondents

CARON, COLVEN, ROBISON
& SHAFTON, P.S.
Attorneys at Law
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Licensed in Washington & Oregon

February 8, 2017

Derek Byrne
Clerk of the Court
Court of Appeals, Division Two
950 Broadway, Suite 300
MS-TB-06
Tacoma, WA 98402-4454

Re: *VanderStoep v. Guthrie,* No. 49597-0-II

Dear Mr. Byrne:

Please find enclosed for filing the original and one copy of the Brief of Respondents in this matter together with the Declaration of Electronic Submission.

Thank you for your attention to this matter.

Very truly yours,

Ben Shafton
Enclosures

BTA

Cc: Clients
Megan Ferris